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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1579

CASIMIR STASZCUK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The panel decision of the court of appeals (Pet. App. A) is reported at 502 F. 2d 875. The *en banc* decision of the court of appeals (Pet. App. B) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 16, 1975 (Pet. App. C). The petition for a writ of certiorari was filed on June 13, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court's *voir dire* examination of prospective jurors was sufficient to permit the intelligent exercise of peremptory challenges.

2. Whether an Alderman who accepts payments in return for his not opposing zoning changes in his Ward may be convicted of extortion under color of official right under 18 U.S.C. 1951.

3. Whether the showing of a potential effect on interstate commerce by an extortionate payment is sufficient to satisfy the interstate commerce requirement of 18 U.S.C. 1951(a).

STATUTE INVOLVED

18 U.S.C. 1951 provides in pertinent part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> * * * * *
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on three counts of extortion under color of official right, in violation of the Hobbs Act (18 U.S.C. 1951(a)), four counts of mail fraud, in violation of 18 U.S.C. 1341, and two counts of having filed false income tax returns, in violation of 26 U.S.C. 7206(1). He was sentenced to a term of eighteen months' imprisonment on each count, the sentences to run concurrently. The court of appeals, in a panel decision, reversed the conviction on the third Hobbs Act count and on the four mail fraud counts and affirmed as to the four remaining counts (Pet. App. A, pp. 1–15). Rehearing the case *en banc,* the court of appeals reversed the panel decision as to the third Hobbs Act count, thus affirming petitioner's conviction on that count, and affirmed the panel decision as to all other counts (Pet. App. B, pp. 16–41). The net result of the *en banc* decision was that petitioner's convictions on the three Hobbs Act counts and the two income tax counts were affirmed and the convictions on the four mail fraud counts were reversed.

1. Petitioner, an Alderman of Chicago's Thirteenth Ward, was charged in a nine-count indictment predicated upon his acceptance of various payments to insure the approval of zoning changes on property located in his Ward. Counts one through three charged petitioner with accepting three separate $3,000 payments from Al C. Allen, a zoning consultant, to refrain from objecting to proposed zoning changes on

four different parcels of land. These payments were alleged to have been induced "under color of official right" in violation of 18 U.S.C. 1951. Counts four through seven charged petitioner with causing the mails to be used in order to further a scheme to defraud the citizens of Chicago through his acceptance of these payments, in violation of 18 U.S.C. 1341. The final two counts charged petitioner with having knowingly filed false income tax returns by failing to report two of the $3,000 payments and half of the third payment, in violation of 26 U.S.C. 7206(1).

In Chicago, the procedural machinery for a zoning change is begun by the filing of a form application and an accompanying filing fee with the City Collector. The application is then introduced in the City Council and referred to its Committee on Building and Zoning. This Committee, composed of Aldermen selected by the Mayor, schedules a public hearing on the matter and its representatives mail notices of the hearing to property owners living within one hundred fifty feet of the site of the proposed zoning change (Tr. 87–90).[1] Approximately fifteen days after the notices are sent, the public hearing is conducted before the full Committee (Tr. 95–96).

An evaluation by the independent Development and Planning Commission also has some bearing on the Committee's ultimate decision. However, although the Committee generally follows the Planning Commis-

[1] "Tr." refers to the transcript of the trial proceedings. "A." refers to the transcript of the testimony of Al C. Allen whose testimony at trial was transcribed daily and is thus in separate volumes from the rest of the trial transcript.

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sion's recommendation, the Commission's view is usually not adopted if the Alderman in whose Ward the property is located strongly disagrees with that recommendation (Tr. 118–119, 130–131).

2. Charles Schaefer, a builder who owned some vacant property in the Thirteenth Ward that he desired to have rezoned in order to construct some apartment buildings, contacted Al C. Allen, a zoning consultant, who also served as a precinct captain in petitioner's Ward (A. 3–6, 54), because Allen's zoning service was "common knowledge among builders," and it was "quite difficult" for individual builders to secure zoning changes (Tr. 147–148, 155, 158). Allen promised a full refund of any amount paid if the zoning change was not approved (Tr. 163).

Thereafter Allen met with petitioner in Chicago's City Hall and asked him if he had any objection to the proposed zoning change. Petitioner indicated that he would look into the situation and get back to Allen in a few days. When he did so, Allen stated that if the zoning change were approved, petitioner would receive $3,000 (A. 8–11).

Petitioner filed for the Schaefer zoning change as a Ward matter on June 26, 1968 (Tr. 103–104).[2] Thereafter, Allen advised Schaefer that he could facilitate the desired change and Schaefer gave him a $5,000 check for "rezoning services" (Tr. 149–150; Gov't Ex. 2–1).[3] At the public hearing held on the

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[2] Because the application was filed as a Ward matter, the $100 filing fee was waived (A. 12; Tr. 88).

[3] Allen considered the fair market value of his own services to be approximately $2,000 per zoning change (A. 31–32).

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matter petitioner argued in support of the zoning change and responded to various citizen objections (Gov't Ex. 1–6).[4] The proposed change was approved by the City Council Committee on Building and Zoning on December 17, 1968 (A. 13). On that same day Allen cashed a check made out to himself for $3,000 which bore the notation "79th & Knox, Schaefer-Casey Staszcuk," and gave the cash to petitioner (A. 13–14; Tr. 206; Gov't Exs. 7–1, 9–1). Allen testified that he gave the cash to petitioner because he "wasn't going to get any resistance on the zoning matter and [Staszcuk] had no objection to it" (A. 17). After the zoning change was approved Schaefer constructed apartment buildings using materials that came from other states (Tr. 343–345; Gov't Exs. A–4 to A–19).

3. Anne Prokop and Steve Zabrodski also owned land in the Thirteenth Ward that they desired to have rezoned in order to build apartment buildings (Tr. 172–173, 179–181). Mrs. Prokop and Zabrodski's son each approached Allen to secure zoning changes. Allen received $2,500 from each of them in early December, 1969 (Tr. 173–175, 181–184; A. 17; Gov't Exs. 3–2, 5–1).

After obtaining petitioner's approval, Allen personally filed the rezoning applications on December 9, 1969 (A. 18, 90). On March 18, 1970, the day before the scheduled public hearing on the matter, Allen

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[4] At the hearing petitioner stated that Schaefer had been present but had to depart early (Gov't Ex. 1–6). At trial Schaefer testified that he did not recall having attended the hearing (Tr. 160–161).

drafted separate $2,000 and $1,000 checks made payable to himself (A. 19; Gov't Exs. 7–2, 7–3). The public hearing was held the next day and Committee approval was immediately granted (Tr. 112). Allen then gave petitioner an envelope containing the $3,000 because "he didn't resist the zoning amendment change" (A. 18–20; Tr. 206–207; Gov't Exs. 9–2, 9–3). Allen stated that the payment was necessary because he believed that "if the Alderman was against the zoning amendment, [he] wouldn't get it" (A. 21). Thereafter, the City Council approved the Committee's recommendation (Tr. 112), and Prokop and Zabrodski constructed apartment buildings on the rezoned properties using materials from out of state (Tr. 345–348).

4. In the summer of 1970, William Harris desired a zoning change for property owned by him in the Thirteenth Ward so that he could build a complex, which would include an animal hospital. His attorney told him that it would be practically impossible to get the zoning change (Tr. 188–189). Upon hearing of Allen's ability to obtain zoning changes, Harris, through an intermediary named Tim Spangler, contacted Allen and obtained his assurance that he could get the zoning change approved. Harris then gave Spangler a check for $5,500 (Gov't Ex. 6–1) to be given to Allen and in return Allen prepared an application form for Harris' signature (Tr. 194–196; A. 86, 92–93).

Since it was Allen's policy never to accept a customer's check until he had received "the authorization

and the okay" (A. 47–49),[5] he talked to petitioner a week before filing the Harris application. In response to Allen's inquiry concerning his objections to the proposed change, petitioner said he would "check it out and let [him] know." Upon being advised by petitioner that there would not be any objection, Allen filed the application on September 16, 1970 (A. 23–24, 71).

On the day before the scheduled hearing on the matter, Allen cashed a check for $1,550 and drafted a $1,500 check to cash (A. 25; Gov't Exs. 7–4, 7–5). At the hearing before the Zoning Committee, petitioner cross-examined the representative of homeowners who opposed the change (Gov't Ex. 1–16). After the hearing, Allen gave petitioner $1,500 in cash and the $1,500 check "because he didn't resist the zoning change" (A. 26–27; Tr. 208, 231–232; Gov't Exs. 8–2, 8–3, 9–4). On January 27, 1971, the Committee approved the zoning change and the City Council followed suit (Gov't Ex. 1–15). However, the veterinarian who had contacted Harris about building the animal hospital reneged on the deal even though Harris had solicited bids on the project and made financial arrangements. Thereafter, Harris constructed retail stores, which could have been built prior to the zoning change (Tr. 192–193). A representative of one of the construction companies who bid on the animal hospital testified that it could not have been built without using materials from out of state (Tr. 289–297).

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[5] By obtaining prior approval, Allen was able to provide his clients with money-back guarantees (Tr. 163, 198).

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5. Petitioner's federal income tax return for 1968 did not reflect the $3,000 from Allen with respect to the Schaefer zoning change (Gov't Ex. 17–1). His 1970 return failed to include the $3,000 from the Prokop-Zabrodski transaction and the $1,500 from the Harris zoning change (Tr. 248; Gov't Ex. 17–2).

ARGUMENT

1. Petitioner contends that the *voir dire* of prospective jurors conducted by the trial court was inadequate to allow petitioner intelligently to exercise his peremptory challenges because the court refused to ask: (1) whether any juror had ever "taken a position" with respect to zoning changes; (2) the length of the jurors' residence at their present addresses and their immediately preceding addresses; (3) the marital status of male jurors and the employment status of their wives; (4) with whom prospective jurors lived and those persons' employment; and (5) whether any jurors had previously served on a petit or grand jury in a criminal case.

Subject to the essential demands of fairness, the trial court has broad discretion in determining what questions to ask prospective jurors on *voir dire* examination. *Ham* v. *South Carolina,* 409 U.S. 524, 527–528; *Aldridge* v. *United States,* 283 U.S. 308, 310; *United States* v. *Smaldone,* 485 F. 2d 1333, 1347 (C.A. 10), certiorari denied, 416 U.S. 936 and *sub nom. Hanners* v. *United States,* 416 U.S. 951. The record indicates that the trial court conducted a thorough *voir dire* with questions designed to elicit information regarding prospective jurors' backgrounds and their ability

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to be impartial. After addressing the entire jury panel on the general issues of their duty of impartiality, the nature of the charges, the burden of proof, the functions of judge and jury, and the presumption of innocence (Tr. 11–21), the court asked more specific questions such as whether they were prejudiced against petitioner because he was an Alderman, whether any of the jurors had been active in politics or held a political job, and whether any juror had friends or relatives who had worked for any law enforcement agencies, including the Internal Revenue Service (Tr. 21–24). The court also asked whether any jurors had ever owned property that was the subject of discussion or conflict concerning a zoning change (Tr. 21). Finally, the court questioned prospective jurors individually as to their names, residence, occupations, and the location of their employers, and, in the case of female jurors, their marital status and husbands' occupations (Tr. 30–44). As counsel exercised their challenges the court would ask each new prospective juror these various questions (Tr. 48–52, 57–79). Petitioner exercised seven of his ten peremptory challenges, the government four, and one juror was excused for cause.

The *voir dire,* consisting of more than sixty pages of the record, provided sufficient information to permit petitioner's counsel to exercise intelligently his challenges. The questions presented by petitioner's counsel would have produced no significant information about the suitability of the prospective jurors, while at the same time such questioning would have

consumed an inordinate amount of time and confused the jurors about the relevant issues in the case. See *United States* v. *Workman,* 454 F.2d 1124, 1128–1129 (C.A. 9), certiorari denied, 409 U.S. 857).

The court's refusal to ask prospective jurors whether any had previously taken a position on a zoning matter was not an abuse of discretion. The trial court had already inquired whether any prospective juror owned property that had been the subject of discussion or conflict concerning a zoning change. This, taken in conjunction with general questions concerning prejudice, bias, and impartiality, was sufficient to elicit any preconceived opinions created by past experiences in zoning matters. The court was not required to put its questions in any particular form or to ask several questions on the same subject merely because it was requested to do so by petitioner. *Ham* v. *South Carolina, supra,* 409 U.S. at 527.

Nor did the court's refusal to ask the background questions concerning residences, living partners, and marital status of males violate the essential demands of fairness. While the court of appeals, in approving the overall *voir dire,* expressed its disapproval of the failure to inquire into the marital status of male jurors (Pet. App. A, p. 12; Pet. App. B, p. 29, n. 20), this refusal to so inquire does not rise to the level of a constitutional violation. Cf. *Hamling* v. *United States,* 418 U.S. 87, 139–140; *Ham* v. *South Carolina, supra,* 409 U.S. at 528. Finally, the court did not abuse its discretion in failing to inquire into the jurors' past experience on petit or grand juries.

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United States v. *Ruggiero,* 472 F. 2d 599, 606–607 (C.A. 2), certiorari denied 412 U.S. 939; *Deck* v. *United States,* 395 F. 2d 89, 92 (C.A. 9); *Bellard* v. *United States,* 356 F. 2d 437, 439 (C.A. 5).

2. Petitioner next contends that his acceptance of payment for not opposing zoning changes in his capacity as an Alderman, does not constitute extortion "under color of official right." This contention relates to the first three counts upon which petitioner was convicted. His sentences on these counts run concurrently with the sentences on the last two counts (the false income tax return counts), which petitioner does not challenge aside from his attack on the *voir dire* of prospective jurors. Thus, if our position regarding the sufficiency of the *voir dire* is correct, it is unnecessary for this Court to consider petitioner's challenge to the convictions on the first three counts. *Barnes* v. *United States,* 412 U.S. 837, 848, n. 16. In any event, this contention regarding the Hobbs Act counts is without merit.

On this issue we rely in part on the panel decision of the court of appeals. As the panel stated in discussing the evidence presented (Pet. App. A, p. 4):

> The government presented sufficient evidence of an alderman's influence [footnote omitted] over zoning applications in his own ward that the jury could conclude [petitioner's] official functions encompassed the unbiased consideration and treatment of all zoning applications. The payments were made to [petitioner] to influence his exercise of the political power he

> held as alderman over zoning applications. To accept money in return for an agreement not to oppose such applications—in effect to suspend independent judgment on the merits of such zoning changes—constitutes obtaining property from another, with his consent, induced under color of official right. * * *

As the panel recognized, the evidence belies petitioner's claim (Pet. 23) that the money he received from Allen was not related to his official functions. Rather, it was given to assure petitioner's suspension of individual judgment, in his capacity as a public official, on the merits of the proposed zoning changes. The motivation of these payments focused on petitioner's office and it is this wrongful use of public office that is prohibited by 18 U.S.C. 1951, which proscribes extortion under color of official right. *United States* v. *Mazzei,* C.A. 3, No. 75–1357, decided July 29, 1975, slip op. pp. 10–11; *United States* v. *Braasch,* 505 F. 2d 139, 151 (C.A. 7), certiorari denied, Nos. 74–764, 74–781, 74–782, 74–5752, April 14, 1975; cf. *United States* v. *Classic,* 313 U.S. 299, 326; *United States* v. *Senak,* 477 F. 2d 304, 306–307 (C.A. 7), certiorari denied, 414 U.S. 856.

Petitioner urges that common law must be consulted in the absence of a special congressional definition of the term to define extortion under color of official right (Pet. 23). At common law extortion was a crime that could only be committed by a public official. And as this Court stated in *United States* v. *Nardello,* 393 U.S. 286, 289:

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> At common law a public official who under color of office obtained the property of another not due either to the office or the official was guilty of extortion.

See, also, Stern, *Prosecutions of Local Political Corruption Under the Hobbs Act: The Unnecessary Distinction Between Bribery and Extortion,* 3 Seton Hall Law Review 1 (1971). As the plain language of the statutory definition of extortion indicates, *supra* at p. 2, Congress included common law extortion within the definition of extortion under the Hobbs Act. See *United States* v. *Kenny,* 462 F. 2d 1205 (C.A. 3), certiorari denied *sub nom. Kropke* v. *United States, et al.,* 409 U.S. 914.

The trial court's instruction conformed to this definition (Tr. 585) and the evidence supported the verdict on these counts. The fact that petitioner's conduct may also have constituted bribery is of no consequence. *United States* v. *Braasch, supra.*

3. Petitioner finally contends that as to count three no effect on interstate commerce was proven because the animal hospital was never built and the buildings that were built could have been built prior to the zoning change. We again note that it is unnecessary for this Court to consider petitioner's challenge to the conviction on this count in light of the concurrent sentences he received. *Barnes* v. *United States, supra.* In any event, this contention is unpersuasive.

As regards this issue, we rely primarily on the *en banc* decision of the court of appeals. After discussing

(1) the purpose of the Hobbs Act to eliminate the "levy of blackmail upon industry * * *" and remove artificial restraints on the free flow of commerce (Pet. App. B, pp. 21–23), (2) the fact that the Act's purpose "parallels the central purpose of the Commerce Clause itself" (*id.*, at p. 23), and (3) Congress' intention in passing the Act to use its constitutional power to regulate commerce to its fullest extent (*Stirone* v. *United States,* 361 U.S. 212, 215) (Pet. App. B, p. 25), the court below held that the Act was intended to cover instances such as that presented here where, at the time of the extortion, there existed a potential effect on interstate commerce.[6] The panel's decision, which had reversed the conviction on count three because there was no actual effect on interstate commerce, erroneously took a hindsight view of the situation. The offense occurred when the extortionate payment was made. At the time petitioner extorted the money in exchange for facilitating the construction of

[6] Other courts have held that a potential effect on interstate commerce is sufficient for Hobbs Act jurisdiction even where no actual effect occurs. See *United States* v. *Crowley*, 504 F. 2d 992, 998, n. 13 (C.A. 7); *United States* v. *Augello*, 451 F. 2d 1167, 1169–1170 (C.A. 2), certiorari denied, 405 U.S. 1070; *United States* v. *Hyde*, 448 F. 2d 815, 836 (C.A. 5), certiorari denied, 404 U.S. 1058; *United States* v. *Pranno*, 385 F. 2d 387, 389 (C.A. 7), certiorari denied, 390 U.S. 944 and *sub nom. Seidler* v. *United States*, 390 U.S. 972; *Hulahan* v. *United States*, 214 F. 2d 441, 445 (C.A. 8), certiorari denied, 348 U.S. 856.

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the animal hospital, the flow of materials in interstate commerce was essential to the project. The offense occurred at the moment of payment, thus creating jurisdiction and allowing for immediate prosecution. The fact that subsequent events caused the deal to fall through had no bearing on the jurisdictional question.

Petitioner's contention and the view adopted by the panel decision of the court of appeals would lead to results that could not have been intended by Congress in passing this broad statute. The panel's decision would force the government to delay prosecution until the project is begun to ensure an actual effect on commerce. Thus, prosecution could be delayed for unconscionably long periods of time. Moreover, if the government were to commence prosecution prior to the beginning of the project, the defendant could then seek to have the project dropped or delayed in order to defeat federal jurisdiction. In light of the prophylactic purposes of the Hobbs Act, Congress could not have intended the construction placed upon it by the panel decision. Rather, the *en banc* holding that a potential effect on commerce at the time of the extortionate payment is sufficient to create federal jurisdiction under the Hobbs Act, is a more accurate reflection of the scope of the statute as intended by Congress.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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